IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 577 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SATWARA HIRA BABU

Versus

STATE OF GUJARAT

Appearance:
Mr.Magan Barot, Senior Advocate, with
Mr.Jiten M. Buddhbhatti for the appellants
Ms. Katha Gajjar, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE A.L.DAVE

Date of decision: 20/10/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Appellants, in this appeal which is filed under Section 374 of the Code of Criminal Procedure (hereafter referred to as 'Code'), have challenged judgment and order dated May 20, 1992 passed by learned Additional Sessions Judge, Jamnagar, in Sessions Case No.14 of 1991, by which judgment, the appellants were convicted under Section 302, read with Section 34, of Indian Penal Code and each of them was sentenced to suffer imprisonment of life and to pay fine of Rs.1000/in default, R.I. for two months. However, the appellants were acquitted for offence punishable under Section 135 of the Bombay Police Act.

2. The prosecution case, as unfolded at the trial, is as under:

P.W. 1, Premiben, (complainant), wife of Ramji Kanji, was residing in the out-skirt of Jamnagar city in a wadi (agricultural field wherein farm house is also constructed) near Manikeshwar Mahadev, along with her husband, Ramji Kanji, and seven sons, namely, (1) Arjan Ramji, (2) Laxman Ramji, (3) Premji Ramji, (4) Bhagwanji Ramji, (5) Devji Ramji, (6) Mulji Ramji, and (7) Gopal Ramji. P.W.1, Premiben had also four daughters and all of them were married. Daughter Muktaben had become widow and therefore she was residing with the complainant. According to the complainant, prior to five years of date of incident, brass-parts factory was established in the wadi and, to run the factory, they had taken electricity line from the adjoining wadi belonging to appellant No.6, Babu Laxman, and his brother, Jayanti Alias Nanu Laxman. It is the case of the complainant that the side of the appellants, time and again, used to disconnect the electricity supply which was given from their wadi. For that, Laxman Ramji (since deceased) had filed a complaint to the Gujarat Electricity Board. Because of filing of the complaint, appellant No.6 and his brother Jayanti Laxman, had developed strained relation with the complainant and her family. When the Officers of the Gujarat Electricity Board had come to the wadi of the complainant to restore electricity supply, appellant No.1 and Jayanti Laxman had beaten them. The Officers of the Electricity Board had complained to their superiors and, therefore, the police personnel had come to their wadi and arrested appellant No.1 and his brother Jayanti Laxman. After this incident, illwill and enmity had developed between the family of the complainant and the family of appellant No.6. Prior to the incident, the side of appellant had attacked the family members of the

complainant and, in that incident, Premji, Bhagwanji, Mulji and nephew of the complainant, Lalji, had sustained injuries due to infliction of blows by swords. In the same incident, the complainant had lost finger of her right hand. For this incident, criminal case was lodged against the side of the appellants. A suit for compensation for injuries sustained by the complainant and her family members was also filed, which was pending in the Civil Court at Jamnagar. As per the prosecution case, during pendency of the criminal as well as civil proceeding, election of Jamnagar Municipal Corporation had taken place and, during that election period, Dahyababu, who was son of appellant no.6, was murdered near Darbargadh, Jamnagar, wherein, for murder of Dahya Babu, son of the complainant,namely, Gopal Ramji and Kanji Bhimji were arraigned as accused. Brass-parts factory, which was previously established in the wadi of the complainant, was after sometime shifted to Kisan Chowk, which was situated in the city of Jamnagar. On the day of the incident, i.e. November 11, 1990, Laxman Ramji, Premji Ramji, his nephew Lalji Bhimji, Jaisukh Arjan and Hemant Arjan had gone to attend the brass-parts factory at Kisan Chowk. Jaisukh Arjan and Hemant Arjan had returned to the wadi around 7 p.m. According to the complainant, Laxman Ramji, Premji Ramji and her nephew Lalji Bhimji had remained at the factory because of some work and they were to return late at night. All the above three persons had two cycles between them. Between 9.30 p.m. and 10 p.m., when the complainant was at her residence situated in the wadi, she heard shouts of all the three persons crying for help. The complainant took a dry-cell battery which was available in the house and rushed towards the directions from which shouts of three persons were raised. As the complainant came out of her wadi, she was shocked to see appellant No.1, Hirji Babu, carrying a sword, appellant no.2, Gopal Babu, carrying a dharia, appellant No.3, Lalji Babu carrying a sphere, appellant no.4 Jayanti Laxman carrying iron khampali (harrow or a rake - name of a tool used by a farmer), appellant No.5, Shamji Laxman carrying gupti and appellant No.6 Babu Laxman (unarmed). All the six persons were proceedings towards their wadi. The complainant with the help of battery went in the direction of river-bed where her nephew Lalji Bhimji was lying in injured condition. Lalji Bhimji was lying on the river bed. When the complainant asked Lalji Bhimji as to how he had sustained injuries, Lalji Bhimji informed the complainant that Hira Babu, appellant No.1, with sword, Gopal Babu, appellant No.2 with dharia, Lalji Babu appellant No.3 with sphere, Jayanti Laxman appellant No.4 with khampali, Shyamji Laxman appellant no.5 with

gupti, and appellant No.6 Babu Laxman with iron pipe, had assaulted him and caused injuries. Lalji also informed the complainant that two brothers, namely, Premji Ramji and Laxman Ramji were lying in injured condition near wadi of Hameed Ahmad. Thereafter, the complainant went to her son, Laxman Ramji, who was lying near wadi of Hameed Ahmad. Laxman Ramji was also seriously injured and had narrated about the incident in the same way as narrated by Lalji Bhimji. Thereafter, the complainant went near the wadi where Premji Ramji was also lying in seriously injured condition. According to the complainant, Premji Ramji also gave same vivid description of the incident and weapons used by each appellant in causing fatal injuries on his body. As per the say of the complainant, her son, Arjan Ramji, Bhagwanji and two sons of Arjan, had also arrived at the place of incident. Thereafter, the complainant instructed Arjan Ramji and his sons to bring a cart. Accordingly, cart was brought, wherein, all the three injured persons were taken to Kisan Chowk. In the cart, the complainant, Arjan Ramji, his two sons, and Bhagwanji had accompanied injured persons. From the shop of Moon Video, which was situated at Kissan Chowk, a message was sent to call for an ambulance. Within 10-15 minutes of message, the ambulance had arrived at and in that ambulance, all the three injured persons, complainant and her son, had gone to Irwin Hospital. When they reached at the hospital at 24.30 hrs, the Doctor on duty on examination of injured persons, had declared them dead. Accordingly vardhi was given to the police constable who was on duty at Irwin Hospital. The police constable, in turn, had sent vardhi to Police Control Room of Jamnagar City, that three persons had died due to beating (maramari). P.I. G.V. Chauhan, received vardhi while he was patrolling on 12.11.2000 around 0.30 hrs that maramari incident had taken place near Manikeshwar Mahadev, P.I. Chauhan to find out the jurisdiction under which police station Manikeshwar Mahadev was situated went to the police station and when he was satisfied that the incident had taken place in the territory of Jamnagar "B" Division Police Station, hd gone to the place of incident via Irwin Hospital. He had posted one constable at the place of incident. After returning to the police station, P.I. Chauhan had recorded complaint of P.W.1, Premiben around 5 a.m. On November 12, 1990. Inquest of dead bodies of Lalji Bhimji, Laxman Ramji and Premji Ramji was held and dead bodies were sent for autopsy. P.W.2, Dr. Satish Dinkar Kalele of M.P. Shah Medical College performed autopsy of the dead bodies of Lalji Bhimji, Laxman Ramji and Premji Ramji. P.I. Chauhan, thereafter, prepared panchanama of scene of offence as

shown by P.W.6, Mulji Ramji. From the place of incident, P.I. Chauhan, collected blood-stained earth, blood-stained gupti, blood-stained knief, two bicyles, one rampuri knief, one pair of goggles in broken condition, and thumb of Lalji Bhimji, which was choped off in the incident. P.I. Chauhan had also collected blood-stained earth where body of Lalji Bhimji was lying near the river bed. From that place, P.I. Chauhan seized one iron pipe, one knife (nagni chhari), which was stained with blood. All these articles were seized under panchanama. Thereafter, P.I. Chauhan had recorded statements of witnesses, Mulji Ramji, Sita, wife of Arjan Ramji, Rasila Arjan, Devaben Arjan, Dhanuben, wife of Arjan Ramji, Maniben, wife of Bhagwan Ramji, Dahyaben wife of Mulji Ramji and Bhanuben wife of Jaisukh Arjan. P.I. Chauhan could not record statements of other witnesses because they were busy with funeral ceremony of three deceased. Appellant Nos, 1, 2 and 3 were arrested under arrest panchanama and their clothes which were stained with blood were seized. On November 13, 1990, P.I, Chauhan had gone in search of other accused and had recorded statements of witnesses. Appellant Nos. 1, 2 and 3, when they were in custody, had shown their willingness to produce weapons used in the incident and, therefore, two independent panchas were called and preliminary panchanama was prepared at the police station. Thereafter, the police party and panchas had gone to the direction as shown by appellants Nos.1, 2 and 3 and had recovered muddamal weapons which were used in commission of offence. The said weapons were seized under panchanama in presence of panchas. The appellants, who were arrested, were taken on remand till November 15, 1990. Thereafter, P.I.Chauhan, recorded statements of Arjan Ramji, Jaysukh Arjan, Hemant Arjan, Shamji Lalji, Bhagwanji Ramji, Dahyeben wife of Premji Ramji, Veluben wife of Ramji, Ramji Kanji, Amrutben, Devji Ramji, Muktaben, daughter of Ramji Kanji, and Deviben wife of Shamji Lalji. Other appellants came to be arrested on November 14, 1990 under an arrest panchanama. At the instance of appellant no.4 under the discovery panchanama, weapons used in the incident came to be discovered. On the same day, P.I. Chauhan recorded statement of Ranchhod Alias Babu Bhimji, and Odhavji Bhimji. Blood samples of all the appellants were collected under panchanama on November 15, 1990. P.I. Chauhan recorded statements of Kanti Mavji, Memon Hamid Haji, Ravji Premji, Rabhuba Jhulabhai, Premji Mavji and Dineshbhai Gordhanbhai, who was owner of Moon Video. On November 16, 1990, P.I. Chauhan received blood-stained clothes and blood samples of deceased from Irwin Hospital, and the said clothes and blood samples were

sent to chemical analyser. After receiving post-mortem notes from Dr.Kalele, P.I. Chauhan filed chargesheet against the appellants for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code and under Section 135 of the Bombay Police Act. As offence under Section 302 of the Indian Penal Code was exclusively triable by the Court of Sessions, learned Chief Judicial Magistrate committed the case to the Court of Sessions, Jamnagar, wherein, it was numbered as Sessions Case No.14 of 1991.

4. Charge Exh.1 was framed against the appellants for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code as well as Section 302 read with sections 147, 148 and 149 of Indian Penal Code and Section 302 read with Section 114 of the Indian Penal Code and Section 135 of the Bombay Police Act. The charge was read over and explained to all the appellants, wherein, they pleaded not guilty and claimed to be tried. The prosecution, to bring home guilt of the appellants, examined following witnesses: (1) P.W. 1, Premiben Ramji (complainant) Exh.13; (2) P.W.2, Dr.Satish Dinkar Kalele, Exh.15, (3) P.W.3, Ajubha Jelamji Jadeja, Circle Inspector, Exh.23, (4) P.W.4, Raghav Bhimji, panch witness (hostile), Exh.27, (5) P.W.5, Ali Mohammed Ismailbhai, panch witness (hostile), Exh.29, (6) P.W.6, Mulji Ramji, brother of deceased Premji Ramji, Exh.31, (7) P.W.7, Arjan Ramji, Exh.32, (8) P.W.8, Naranbhai Gokalbhai, panch witness (hostile), Exh.33, (9) P.W.9, Ashokbhai Zavergiri, panch witness (hostile), Exh.35, (10) P.W.10, Ismailbhai, panch witness (hostile), Exh.37, (11) P.W.11, Iliyaas Mohammed, panch witness (hostile), Exh.39, (12) P.W.12, Ashwin Nathalal, panch witness (hostile), Exh.41, (13) P.W.13, Dhanjibhai Mohanbhai, panch witness (hostile), Exh.43, (14) P.W.14, Vinodbhai Prabhulal, panch witness (hostile), Exh.45, (15), P.W.15, Bhimabhai Naranbhai, panch witness (hostile), Exh.48, (16) P.W.16, Bachubhai Dayabhai, panch witness (hostile), Exh.50, (17) P.W.17, Rameshbhai Kantilal, panch witness (hostile), Exh.52, (18) P.W.18, Bipinbhai Bhawanbhai, panch witness (hostile), Exh.54, (19) P.W.19, Bhalshibhai Koyabhai, Police Constable, Jamnagar "B" Division Police Station, Exh.56, (20) P.W.20, Bharatbhai Galabhai, Head Constable, City "A" Police Station, Jamnagar, Exh.58, and (21) P.W.21, Investigating Officer, P.I. G.B. Chauhan. The prosecution produced documentary evidence such as inquest panchanam Exh.17, post-mortem notes of deceased Premji Ramji at Exh.20, post-mortem notes of deceased Lalji Bhimji at Exh.21, post-mortem notes of deceased Laxman Ramji at Exh.22, panchanama of scene of offence at Exh.25, map of scene of offence at Exh.26, panchanama of

scene of offence at Exh.28, arrest panchanama of appellants Nos. 1, 2 and 3 Exh.34, discovery panchanama by appellants Nos.1, 2 and 3 Exh.36, 37 and 38, discovery panchnama by appellant No.4 Exh.40, panchanama of seizure of clothes of deceased persons Exh.44, arrest panchanama of appellants Nos.4, 5 and 6 at Exh.46, inquest panchanam Ex.49, complaint lodged by P.W.1, Premiben Exh.62, report of FSL Exh.66, report of serological analysis Exh.67, etc, to prove the case against the appellants.

5. After completing evidence led by the prosecution, the appellants were questioned with regard to evidence led against them and their statements came to be recorded under Sections 313 of the Code. The defence of all the appellants is of general denial. The appellants, in their further statements, had stated that, as they were witnesses in the murder case of Dahya Babu, they were falsely involved in the present case. It is further stated that, because of inimical relationship with the complainant's side, they were falsely implicated in this case.

6. Learned Additional Sessions Judge, after hearing the arguments of learned Public Prosecutor and learned counsel for defence, concluded that: (1) all the three deceased died homicidal death; (2) all the three deceased persons had given oral dying declaration before P.W.1, Premiben, which implicated all the six appellants for causing death of deceased persons; (3) that medical evidence of Dr. Kalele did not indicate that deceased persons were not in a position to speak and give oral dying declaration before P.W.1, Premiben; (4) P.W.1, Premiben when she came out of her wadi after hearing shouts of three persons, had seen in light of battery all the six appellants coming from the direction of the place of incident armed with deadly weapons and hurriedly proceeding towards their wadi; (5) the appellants had motive to cause death of deceased persons because of long-drawn enmity and various proceedings pending between two rival parties; (6) there was no delay in lodging of first information report; (7) evidence of P.W.1, Premiben was most reliable and trust-worthy and there was no reason to falsely implicate the appellants; (8) oral dying declaration made by three deceased persons was reliable and trust-worthy as deceased persons, who were on the verge of their death, would not spare the real culprits and would not involve innocent persons; (9) there was no question of mistaken identity as the appellants were known to P.W.1, Premiben because they were residing in the adjoining wadi. On the basis of abovereferred to conclusion, learned Additional Sessions

Judge convicted and sentenced the appellants as mentioned in paragraph 1 of this judgment, which has given rise to filing of this appeal.

7. Learned Senior Advocate, Mr. M.R. Barot and learned Additional Public Prosecutor, Ms. Katha Gajjar, have taken us through the entire evidence produced at the trial. Learned Senior Advocate, Mr. M.R. Barot has vehemently submitted that injuries sustained by three deceased persons were of such grave nature that they would not have been able to make any declaration before P.W.1, Premiben. Learned Senior Advocate, Mr. M.R. Barot, further submitted that evidence of P.W.1, Premiben, was highly doubtful as she had made many improvements and there are infirmities in her evidence, which casts serious doubt about alleged oral dying declaration made by the deceased. Learned Senior Advocate, Mr. M.R. Barot, submitted that the dead bodies of deceased had reached Irwin Hospital at around 23.40 hrs and duty constable, namely, Bharatbhai Galabhai, P.W.20, at the hospital had interrogated the persons who had accompanied the dead bodies, and, on interrogation, they had not disclosed the names of appellants but had only mentioned that deceased persons had sustained injuries in a maramari (beating). Learned Senior Advocate, Mr. M.R. Barot, submitted that Premiben and her son, Arjan Ramji, had also gone to Irwin Hospital along with dead bodies and in spite of the fact that they claim to have knowledge that the appellants had caused murder of three deceased persons, they had not disclosed the names to duty constable, Bharatbhai Galabhai, P.W.20. Learned Senior Advocate, Mr. M.R. Barot, therefore, submitted that the first information report was lodged after due deliberation in early hours of 12.11.1990 around 5 a.m. and, therefore no reliance should be placed on the delayed first information report. Learned Senior Advocate, Mr. M.R. Barot further submitted that independent witnesses, whose statements were recorded, were deliberately not examined in the Sessions Court and, therefore, adverse inference should be raised against the prosecution. Learned Senior Advocate, Mr. M.R. Barot, submitted that vardhi, which was sent from Irwin Hospital, should be treated as first information report, because, on the basis of that vardhi, investigation had already started and the first information report which was lodged by Premiben would be merely a statement recorded by the Police Officer and would be hit by provision of Section 162 of the Code. Learned Senior Advocate, Mr. M.R. Barot further submitted that alleged recovery of weapons at the instance of the appellants was not proved as panch

witnesses had turned hostile. Learned Senior Advocate, Mr. M.R. Barot, also submitted that as per the panchanama drawn on the scene of offence some of the weapons alleged to have been used in commission of crime were found from the scene of offence and, therefore also, recovery made at the instance of the appellants should not be believed. Learned Senior Advocate, Mr. M.R. Barot, also submitted that according to the evidence of P.W.1, Premiben, except appellant No.6, all other appellants were found running away from the scene of offence carrying weapons in their hands whereas panchanama of scene of offence revealed that weapons like gupti, knife, dagger, were found from the place of incident and, therefore, evidence of Premiben that she had seen appellants hurriedly going towards their wadi carrying weapons was unreliable. Learned Senior Advocate, Mr. M.R. Barot therefore submitted that the case against the appellants was solely based on oral dying declarations which was highly doubtful because the deceased had sustained serious injuries and they could not have been in fit state of mind and able to speak and, therefore, the appeals should be allowed and conviction and sentence should be set aside.

8. Learned Additional Public Prosecutor, Ms. Gajjar, has, on the other hand, submitted that there is no reason to discard the evidence of P.W.1, Premiben, who, on hearing shouts of three deceased persons, had gone to the direction of river bed and on the way in light of the battery she had seen appellants running away with weapons in their hands towards their wadi. Learned Additional Public Prosecutor has further submitted that Premiben had first approached deceased Lalji Bhimji who was lying in river-bed and when she asked him as to how the incident had taken place, Lalji Bhimji had explained in detail the injuries sustained by him and had also narrated which appellant was carrying which weapon and how the injuries were inflicted on them. Learned Additional Public Prosecutor has further submitted that accordingly other two deceased person,namely, Premji Ramji and Laxman Ramji, had also narrated in detail the weapons carried by the appellants and assault launched on them by the appellants. Learned Additional Public Prosecutor has further submitted that merely because witnesses examined by the prosecution are related, their evidence can at best be minutely scrutinized but their evidence cannot be disgarded in toto. Learned Additional Public Prosecutor has further submitted that when the prosecution had unfolded the entire story, there was no need to examine all the witnesses. Learned Additional Public Prosecutor has further submitted that it is not

the quantity of witnesses, but quality of evidence should be borne in mind while appreciating the prosecution case. Learned Additional Public Prosecutor has further submitted that vardhi which was sent from Irwin Hospital by P.W.20, Bharatbhai Galabhai, to the police control room was a cryptic message and no investigation had started because P.I. Chauhan was not certain as to under the jurisdiction of which police station the place of incident would fall. Learned Additional Public Prosecutor has therefore submitted that after receiving vardhi he had first gone to the place of incident to find out under the jurisdiction of which police station the place of incident would fall. Learned Additional Public Prosecutor has further submitted that the investigation had actually started after recording of complaint by Premiben at 5 a.m. on November 12, 1990. Learned Additional Public Prosecutor has further submitted that evidence of Dr. Kalele did not suggest that all the three deceased persons would not have been able to make statements before Premiben with regard to the fact that the appellants with their respective weapons, had caused injuries on three deceased persons. Learned Additional Public Prosecutor has further submitted that the appellants had strong motive to commit murder of three deceased persons because of previous enmity and as they suspected that the side of the complainant was responsible for causing death of Dahya Babu, who was son of appellant No.6. Learned Additional Public Prosecutor has also submitted that evidence of P.W.1, Premiben, was most reliable and trust-worthy and there is no reason to disbelieve her evidence with regard to oral dying declaration made before her by three deceased persons and, therefore, the appeal may be dismissed.

9. It is an admitted fact that wadi (farm house with agricultural field) of the complainant side was situated in the outskirts of Jamnagar city near Manikeshwar Mahadev, which was at a distance of nearly 6 kms from the city. The wadi of the appellants was also adjoining to the wadi of Premiben. The entire prosecution rests on oral declaration made by three deceased persons before Premiben. According to the post-mortem note Exh.20 deceased Premji Ramji had sustained the following injuries.
External injuries.:

1. 7 cm. x 2 cm. vertical clean cut wound, bone deep, 2 cm. above the right eyebrow on right half of forehead.

2. Curved 7 cms. long, scalp deep clean cut wound

directed backward and slightly downward with avalsion of posterior flap of scalp of wound, situated on right side of front of head, right to inj - (1).

3. 13 cm. long, brain deep anterpposterior clean cut chopwound, directed tangentially to left and slightly downward, situated on top of head.

4. 13 cms. long anteroposterior, bone deep, chop wound with clean cut edges, 3 cms. to the left of inj. (3).

5. Transverse 10 cms. long, none deep chop wound with clean cut margins, present on back of head in the plan of two ears.

6. Vertical 2 x 1 cm. stab wound on anteromedial part of front of right arm in lower part.

7. Vertical 2 x 1 cm. stab wound on anterolateral part of lower part of right arm.

8. Vertical 3 x 1 cm. stab wound on left side of chest, 4 cm. to left of midline, just below left clavicle. Directed backward and slightly inward. It is penetrating into left chest cavity.

9. 3 x 1 cm. oblique stab wound on right side of chest, 4.5 cm. to right of midline and 11 cm. below right clavicle. It is directed backward and downward and penetrated into right chest cavity.

10. Vertical 3 x 1 cm. stab wound on upper left part of abdomen, 3 cm. to left of midline. Directed backward. Penetrated into abdominal cavity.

11. Transverse 1 cm. long skin deep incised wound on left lower part of chest, 13 cms. to left of midline of chest.

12. Vertical 1 x 0.5 cm. stab wound directed forward and to the right on left posterolateral part of back of chest. It is 10 cm. to left of midline and 28 cms. below upper border of left shoulder.

Margins of all stabwounds are clean cut, one end pointed and other end relatively rounded.

Internal Injuries.:

1. Due to ext. inj. 1,3,4,5 the skull is clean cut and due to ext. inj. 5 dura and brain are also cut. From the cuts in skull, various fracture lines radiate to involve rest of skull including all three fossa of base of skull. Brain shows subarachnoid hemorrhage due to ext. inj. 1 to 5 on its all surfaces.

2. Ext. inj. 6 and 7 are interconnected internally by a common would track showing ecchymosis.

3. Ext. inj. 8 pierced through upper lobe of left long causing ecchymosis in the lung and hemorrhage of 500 cc. in left chest cavity with collapse of left long. total depth of the injury is about 15 cms.

4. Ext.inj. 9 cut through right 4th rib, pierced throughout lower lobe of right long, then into right dome of diaphragm then into right lobe of liver from its upper surface. Due to this injury there is 500 cc. hemorrhage with collapse of right long in right chest cavity and 300 cc. hemorrhage in abdominal cavity. Total depth of the inj. is about 15 cms.

5. Ext.inj. (10) penetrated into abdominal cavity causing cut in mesentery c ecchymosis and injuring hilar region of left kidney leading to peri-renal hematoma. Total depth of wound abut 12 cms.

6. Ext. inj. (12) penetrated into abdominal cavity from back and caused left perirenal hematoma by causing a 1 cm. long x 0.5 cm. deep, vertical cut on back of left kidney. Total depth of the wound is about 5 cms.

All injuries are antemortem in nature.

Cause of death :

Shock due to injuries to the head, chest and abdomen.

According to the post-mortem note Exh.21 deceased Lalji Bhimji had sustained the following injuries.
External injuries.:

1. 6 x 3 cm. oblong shaped transverse, tangentially chopped wound with sharp margins with missing of

scalp skin in wound area. It is directed downward and to the right. It is situated on right side of vault of skull in coronal plane. 6 cm. above the right ear.

2. V - shaped chopped wound with one limb 9 cms. long and other limb 7 cms long. The wound is just behind wound no.(1)

3. An oblique 11 cms. long chopped wound on left posterolateral aspect of head. Its left end is at upper level than its right end.

4. An oblique 6 cms. long chop wound crossing wound no. (3) transversely.

5. An oblique 10 cms. long chop wound is crossing wound no.(3) transversely 5 cms. below wound (4).

6. A transverse 6 x 1.5 cm. chop wound on outer part of left half of back.

7. An oblique 16 cm. x 5 cm. chop wound (its right end is at upper level) present on left half of back in upper 1/3 part just to the right of wound (6).

8. An oblique 8 cm. x 3 cms. chop wound with its left upper end, is crossing wound no.(7).

9. Paraller to and just to right of wound no.(7) is a chop wound 4 cm. x 1.5 cm. on left half of upper 1/3 of back.

10. A vertical 8 cm. x 3 cm. chop wound, in middle 1/3 of back, 4 cms. to left of midline of back.

11. A vertical 3 cm. x 1 cm. chop wound on lower third of left half of back, 12 cms. to left of midline.

12. A linear 3 cm. long x 1 to 2 mm. wide abrasion present on top of left side of back.

13. 6 x 3 cm. transverse incised wound on front of lower third of left arm.

14. 9 x 5 cm. clean cut wound totally cutting off left thumb from its base. The left thumb is missing.

15. Tangential V shaped incised wound (apex downward) on palmar aspect of left middle finger. Its two

limbs are 3 cms. and 4 cms. long.

16. 2 cm. long transverse, incised wound on palmar aspect of middle phalanx of left ring finger.

17. 2 x 0.5 cm. stab wound on medial surface of upper part of left thigh 2 cms. below left groin. Directed forward to left and slightly upward.

18. 7 cms. long skin deep transverse incised wound on upper part of anteromedial part of right thigh 2 cms. below right groin.

19. 14 cms. long incised wound 0.2 to 0.5 cm. wide is present from inner border of right hand to proximal phalanges of little, ring and middle fingers.

20. Inverted V shaped tangential, incised wound with its outer limb 10 cms. long and inner limb 6 cms. long with its apex upwards on back of middle 1/3 of right forearm.

21. Curved 4 x 3 cm. abrasion (transversely present) 3 cms. above wound (20).

22. Vertical 6 cms. long abrasion 4 cms. behind the above abrasion.

23. 2 x 1 cm. stab wound on left deltoid region of left arm.

24. Transverse linear abrasion 6 cm. long on left deltoid region.

25. 15 cm. long linear anteroposterior abrasion top of left shoulder.

26. 13 cm. x 3 cm. skin deep incised wound almo transverse on right anterolateral aspect of chest 9 cms. below level of right axilla.

Internal injuries.:

1. Ext. inj. no. (1), (2), (3), (4) and (5) show cutting of underlying skull bone under each of them along with cutting of coverings of brain and brain itself with subarachnoid hemorrhage all over the brain. Rest of the skull shows irregular fracture lines radiating from above mentioned fractures involving all three fossa of base of skull.

2. Ext. inj. no. (6), (7), (8), (9), (10) have cut underlying muscles and bones where ecchymosis is present but they are not penetrating into the chest cavities. While ext. inj. no. (11) has cut underlying muscle with ecchymosis.

3. Ext. inj. (13) has cut underlying muscle with ecchymosis.

4. Ext. inj. (15) has cut underlying muscle and bone with ecchymosis.

5. Ext. inj. (16) has cut underlying muscle and partially cut underlying bone with ecchymosis.

6. Ext. inj. (17) has penetrated underlying muscle for about 8 cms. depth with ecchymosis.

7. Ext. inj. (19) has only superficially cut underlying bones ecchymosis present.

8. Ext. inj. (20) shows cutting of underlying muscle c ecchymosis.

9. Ext. inj. (23) is 3 cms. deep cutting the underlying muscle c ecchymosis.

No injury has entered into either thoracic cavity or into abdominal cavity.

All injuries are antemortem in nature.

Cause of death :

Shock due to head injuries.

According to the post-mortem note Exh.22 deceased Laxman Ramji had sustained the following injuries.
External injuries.:

1. 16 cm. x 4 cm. x 5 cm. deep antero posterior chop wound from posterior half of left side of face to back of neck on left side, making a cut in lower 1/3rd of pinna of left ear.

2. Behind left angle of mandible on left side of beck, 1 cm. below inj. (1) is anteroposterior 2 cm. long skin deep incised wound with tailing of its posterior end.

3. Small abrasion on medial border of right little finger base.

4. 1 cm. long incised wound on dorsal aspect of right forearm in middle part.

5. 2 cms. long vertical incised wound on front of right forearm in its lower third outer border.

6. Inverted L shaped (To) stab wound on epigastric region of abdomen, its transverse limb being 3 cms. and vertical limb is 5 cms. It is penetrating into abdominal cavity in backward and rightward direction.

7. Vertical 12 cm. x 2 cm. abrasion on postero lateral aspect of left upper arm.

8. 6 cms. long linear vertical abrasion on left side of chest 8 cms below left axilla in midaxillary line.

9. On middle of back of left forearm, a semicircular, muscle deep clean cut wound with upward avulsion of skin is present of size 6 cms. long. It is oblique wound.

10 & 11 Two slightly oblique almost horizontal bone deep incised wounds having size 13 cm. x 4 cm. and 16 cm. x 4 cms. are meeting each other in their front half. They are present on left side of chest just below left axilla.

12. 3 x 1 cm. horizontal incised wound on left half of back, 12 cms. below base of neck. Its right end is skin deep while its left end is tailing in abrasion form. It is muscle deep between its two ends.

13. At front of upper third of left thigh, a curved 4 cms. long abrasion present.

14. Horizontal incised, skin deep wound of size 2 x 1 cm. on medial aspect of right thigh in middle.

15. Vertical 4 x 1 cm. incised wound surrounded by abrasion is present on anterolateral aspect of upper third of right thigh.

16. Multiple linear abrasions on front outer and back aspect of right let in its whole length.

17. Two skin deep oblique incised wounds of size 1 cm. long and 2 cms. long present in same line on posterolateral aspect of left elbow.

18. Vertically oblique 5 x 1 cm. skin deep, incised wound on left half of back, 28 cms. below base of neck and 2 cm. to left of midline of back.

Cuts on the clothes corresponding to the ext. injuries on the body.

Internal injuries :

1. Left condyloid part of mandible, muscles and left mastoid process are cut through under ext. inj.(1).

2. Ext. inj. (6) penetrated junctional part of both lobes of liver through and through and caused cut in the hilar region of right kidney causing right peri-renal hematoma, mesenteric ecchymosis on right side and hemorrhage in abdominal cavity. Its depth is about 10 cms.

3. Left 3rd, 4th, 5th and 6th ribs are fractured along with cutting of muscles under ext. inj. (10 and (11). They are not penetrating chest cavity.

All the injuries are of antemortem nature.

Cause of death :

Shock due to stab injury penetrating the abdominal cavity and injuries to neck and chest.

10. At the trial, during the examination in chief of P.W. 2, Dr. Kalele, learned Public Prosecutor, who appeared in the trial court, had not put a suggestion that after sustaining serious injuries on their head, neck and vital parts of their body, three deceased persons could have been able to speak and make oral declaration before P.W.1, Premiben. In cross examination, Dr. Kalele had admitted that, if any injury was caused on brain, the person would at once become unconscious. He deposed that deceased Premji Ramji had sustained serious injury on the brain and his brain was cut in two parts and he would have lost consciousness at once. With regard to injuries sustained by deceased Lalji Bhimji, he deposed that the injuries caused on his head were so serious that he would have lost

consciousness immediately. Dr.Kalele also deposed that the injuries sustained by Lalji Bhimji on his head were so serious in nature that recovery was impossible. He categorically deposed that deceased Premji Ramji, because of injuries sustained on his brain, would have died instaneously. Similarly, he deposed that Lalji Bhimji would have also died instaneously because of serious head injuries sustained by him on his head. Further, Dr. Kalele deposed that the injuries sustained by deceased Laxman Ramji on his jaw and liver were serious and death could have been caused within couple of minutes. Further, he deposed that, because of injuries caused on mendible bones of deceased Laxman Ramji, he would have great difficulty in speaking. With regard to injuries sustained by Laxman Ramji, Dr. Kalele deposed that because of pain due to injuries on jaw, liver and kidney, he must have gone in coma within short time and would have lost consciousness. The evidence of Dr. Kalele, in our opinion, does not establish that the deceased persons would have been able to make the detailed oral declaration before P.W.1, Premiben, as is claimed by prosecution. The injuries sustained by Premji Ramji and Lalji Bhimji on their heads and brains were so serious that they would have lost consciousness at once. The injuries sustained by Laxman Ramji on the jaw, neck, liver and kidney were also very serious and because of profused bleeding deceased Laxman Ramji would not have been able to make declaration that too in a minute detail.

11. However, learned Additional Public Prosecutor has strongly urged that, as per the post-mortem notes, all the deceased were stoutly built male persons and could have lived for some time after they had sustained injuries. In support of the submission, learned Additional Public Prosecutor has placed reliance on the decision of the Supreme Court in the case of Somappa vs. State of Mysore, reported in AIR 1979 Supreme Court 1831. In the above decision, the Supreme Court ruled that the opinion of the doctor cannot be conclusive on a question of the ability of the deceased to talk immediately after the occurrence. The decision on which the reliance is placed by learned Additional Public Prosecutor, in our opinion, would not apply to the facts of the present case. The deceased persons may be stoutly built, but the injuries caused on their head, brain, and jaw were so serious that they must have lost consciousness at once. Even if it is accepted that they would be conscious for some time, in our opinion, their ability to speak and give such a detailed account of what had happened would be immediately impaired. In examination in chief of Dr.

Kalele, even not a suggestion was made by learned Public Prosecutor who appeared at the trial before the Sessions Court that the deceased would have been able to speak even after sustaining such serious injuries on the brain and other parts of their bodies. Even after the cross-examination, no clarification is sought from the Doctor in re-examination.

12. P.W.1, Premiben, is mother of deceased Premji Ramji and Laxman Ramji and paternal aunt of deceased Lalji Bhimji. At the time of incident, she was aged 60 years. When the incident took place around 9.30 to 10 p.m. on November 11, 1990, there were many male members present in her house, which was situated in the wadi. On hearing shouts of all the three deceased persons, she had taken the battery and had rushed towards the direction from where shouts were coming. When male members were present, without informing them, she had run towards the direction of river-bed carrying the battery, which also casts serious doubt in our mind that she was the first person to reach the river bed where body of deceased Lalji Bhimji was lying. As stated earlier, deceased Lalji Bhimji had sustained serious injuries on his head and brain and could not have been able to speak a word, but, according to the oral evidence of Premiben, deceased Lalji Bhimji, had narrated the incident in detail and had informed Premiben the weapons carried by each appellant. According to the evidence of Premiben, while she was asking Lalji Bhimji how he had sustained injuries, Arjan Ramji, P.W.7, had also arrived near Lalji Bhimji. P.W.7, Arjan Ramji had not deposed that deceased Lalji Bhimji had made such declaration before Premiben. Deceased Lalji Bhimji had informed Premiben that Laxman Ramji and Premji Ramji were lying near wadi of Hameed Ahmed. The sketch of scene of offence prepared by P.W.3, Circle Inspector, Ajubha Jadeja was produced at Exh.26. It shows that body of Laxman Ramji was lying at a distance of more than 200 feet from the body of Lalji Bhimji. It also shows that distance between the bodies of Laxman Ramji and Premji Ramji was 40 feet. The Investigating Agency had recorded statement of inhabitants who were staying in the wadi of Hameed Ahmed, but those witnesses were not examined at the trial. In our view, the prosecution has kept back the independent witnesses and, in our opinion, the real genesis of occurrence of the incident does not come before the Court. After going to the bodies of Laxman Ramji and Premji Ramji, P.W.1, Premiben, told her son, Arjan, to bring a cart so that the bodies of three persons can be taken to the hospital. After bringing the cart, P.W.1, Premiben, Arjanbhai Ramjibhai, and two sons Jaisukh and Hemant had put the

dead bodies in the cart. According to P.W.1, Premiben, she sat in the cart keeping the heads of all three persons on her lap. The cart was taken to Kissan Chowk and from the shop of Moon Video, a call was made to Irwin Hospital to send an ambulance. Dineshbhai was the owner of Moon Video. The investigating agency had recorded his statement but he was not offered as witness at the trial. Dineshbhai would have been an independent witness who could have thrown light on the fact as to whether the deceased were alive when they had reached Kissan Chowk. From Kissan Chowk, dead bodies of the deceased were taken to Irwin Hospital in the Ambulance. Arjan Ramjibhai and P.W.1, Premiben, had accompanied dead bodies in the Ambulance to Irwin Hospital. It is surprising to note that even though P.W.1, Premiben, had admitted in her oral evidence that her clothes were soaked with blood, the investigating agency had not taken care to collect blood stained clothes put on by P.W.1, Premiben. At Irwin Hospital, the Doctor on duty had examined all three persons and had declared them dead at 23.40 hrs. P.W.20, Police Head Constable, Bharatbhai Galabhai, deposed that on November 11, 1990, around 23.40 hrs, the Doctor on duty in casualty ward of Irwin Hospital had sent yadi that three persons, namely, Premji Ramji, Laxman Ramji and Lalji Bhimji, were brought to the hospital and they were declared dead. The said yadi was entered in MLC Register by P.W.20, Head Constable, Bharatbhai Galabhai. P.W.20, Bharatbhai Galabhai, deposed that after recording yadi in MLC Register, he had sent vardhi through police constable, Nalin Bharthi, to "A" Division Police Station. In cross examination, P.W.20, Bharatbhai Galabhai, deposed that he had interrogated the persons who had accompanied dead bodies and he had learnt from their interrogation that the deceased had sustained injuries in a 'maramari'. Accordingly, in the yadi Exh.59, it was so mentioned that the deceased had sustained injuries in 'maramari'. He further deposed in cross examination that during interrogation of relatives who had accompanied the dead bodies disclosed that they could not disclose the names of the assailants as their names were not fixed. P.W.1, Premiben, while on the way to Kisan Chowk when they were travelling in the cart, had already disclosed to P.W.7, Arjan Ramji as to how the incident had taken place and the oral declaration made by all three deceased persons and the names of the appellants as assailants, as disclosed by the deceased persons. In spite of this fact, names of appellants were not disclosed to duty constable, Bharatbhai Galabhai, P.W.20, by P.W.7, Arjan Ramji or P.W.1, Premiben.

13. P.W.21, P.I, Chauhan, who was at the relevant

time, serving as PSI, Panch Koshi "B" Division Police Station, Jamnagar, received information from PSO, Chandrakant, around 0.30 hrs on November 12, 1990, that a maramari had taken place near Manikeshwar Mahadev. Looking to the evidence of P.I. Chauhan, on receiving information, to find out under which police station the place of incident would fall, he first went to the police station and from there on his way to the place of incident he had visited Irwin Hospital. He deposed that to keep vigil at the place of incident, he had posted police personnel and, thereafter, he returned to Jamnagar and recorded complaint of P.W.1,Premiben. Submission of Senior Advocate, Mr.Barot, that information sent by P.W.20, Bharatbhai Galabhai, should be treated as first information report and not the complaint lodged by P.W.1, Premiben, at Exh.62, deserves to be rejected. Vardhi sent from Irwin Hospital around 23.40 hrs was a cryptic message, wherein, no details of occurence of incident was mentioned. Even the investigation had not started on receipt of that vardhi. P.I. Chauhan himself admitted that he was not certain under the jurisdiction of which police station the place of incident would fall. He, therefore, first went to the place of incident to find out the jurisdiction of police station. The investigation had started by P.I.Chauhan only after recording of complaint of P.W.1, Premiben. In the case of Ramsinh Bavaji Jadeja vs. State of Gujarat, reported in III 1994 (1) Crimes 729, it was ruled by the Supreme Court as under:

"From time to time, controversy has been raised as to at what stage the investigation commences. That has to be considered and examined on the facts of each case, especially, when the information of a cognizable offence has been given on telephone. If the telephonic message is cryptic in nature and the officer in charge, proceeds to the place of occurrence on basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone,shall be deemed to be First Information Report. The object and purpose of giving such telephonic message is not to lodge the First Information Report, but to request the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on basis of that information, the officer in charge is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence then any statement made by any person in respect of the said

offence including about the participants, shall be deemed to be a statement made by a peron to the police officer 'in the course of investigation', covered by Section 162 of the Code. That statement cannot be treated as First Information Report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as First Information Report."

P.I.Chauhan had started investigation only after recording of first information report Exh.62 lodged by P.W.1, Premiben. Therefore, we are of the view that the learned Sessions Judge was justified in treating complaint at Exh.62 as first information report and not vardhi sent by P.W.20, Police Constable, Bharatbhai Galabhai.

14. As stated earlier, the whole case against the appellants rests only on oral dying declaration made by three deceased persons before P.W.1, Premiben. P.W.1, Premiben, had already disclosed before P.W.7, Arjanbhai Ramjibhai and his sons, Jaisukh and Hemant, the names of assailants while they were travelling in the cart. She had also disclosed the source of information to the above persons that all the three deceased persons had made oral declaration before her. In spite of this knowledge, names of appellants were not disclosed either by P.W.1, Premiben, or by Arjanbhai Ramjibhai, who was very much present at the Irwin Hospital. The medical evidence of Dr. Kalele, does not show that the deceased persons would have been able to speak after receiving such grievous head and jaw injuries and the injuries on other vital parts. Admittedly, there was profused bleeding from the injuries on the vital parts such as stomach, liver and kidney. It is true that the medical evidence is only an opinion, but we have to appreciate medical evidence in light of oral evidence of prosecution witnesses, P.W.1, Premiben, and P.W.7, Arjanbhai Ramjibhai. We have found many inconsistencies and contradictions in the evidence of P.W.1, Premiben, and P.W.7, Arjanbhai Ramjibhai. At one point of time, Devji Ramji was told to lodge first information report, but, for the reasons best known to him, he refused to be the complainant and, instead, a lady who was aged 60 years was made complainant. P.W.1, Premiben, was not an eye-witness to the incident. Normally, one would hesitate to make an old lady as complainant if other male members were available to lodge complaint. P.I.Chauhan had first gone to Irwin Hospital after receiving vardhi and never recorded complaint of Premiben or other persons who were present at the hospital. We are satisfied that

lodging of first information report on the next day morning was as a result of deliberation and to make out a case of oral declaration made by three deceased persons. It would not have been possible for P.W.1,Premiben, to have gone to all three persons and collect information in detail as a result of oral declaration more particularly when all three deceased persons were lying at distance and at three different places and that too in the dark night and there being no electricity facility available near the place of incident. In the case of Ramsai vs. State of Madhya Pradesh, reported in AIR 1994 Supreme Court 464, the facts before the Supreme Court were that oral dying declaration was made by the deceased before the prosecution witness, but was disclosed to the police not immediately but after two days of death of deceased. No explanation was given for delayed disclosure. Medical evidence made it doubtful whether the deceased could have made such statement before the witnesses. In the same facts, the Supreme Court observed that oral dying declaration is, no doubt, an important piece of evidence, but it should be free from all infirmities. As noted earlier, there are many infirmities in the oral evidence of P.W.1, Premiben and P.W.7, Arjan Ramji, which makes the alleged oral dying declarations most suspecious piece of evidence. The medical evidence indicates that the injuries sustained by three deceased persons were such that they would not have been able to make declaration and that too in minute details. Furthermore, the witnesses, who knew the names of the assailants immediately through the oral dying declarations made before to P.W.1, Premiben, P.W.7, Arjanbhai Ramjibhai and his two sons, did not disclose the names of assailants at the hospital. The evidence of prosecution witnesses, namely, P.W.1, Premiben and P.W.7, Arjanbhai Ramjibhai, is highly unnatural which raises serious doubts in our mind about making of oral dying declaration by three deceased persons before P.W.1,Premiben.

15. We also find from the map (Exh.26) that out of three injured persons, Lalji Bhimji was lying farthest towards the east. Premji Ramji was lying farthest towards the west and Lakhman Ramji was lying in between these two persons. The distance between Lalji Bhimji and Lakhman Ramji was about 194 feet and that of Lakhman Ramji and Premji Ramji was either 40 feet or 70 feet. According to the complainant, P.W.1, Premiben, as admitted by her in cross-examination, when she went to the place hearing the shouts, she first came across Lalji Bhimji, then she went to Premji Ramji and then she went to Lakhman Ramji. This does not appear to be reasonably natural or reliable version. Not only this, she even

goes to the length of saying that when she went to the place, she first came across Lalji and after talking to him, she went further and first came across Premji. This does not conform to the facts situation emerging from map (Exh.26). This adds to the doubtfulness in reliability of her deposition.

16. To base conviction on the dying declaration, the Court must be satisfied that it is wholly reliable and it does not suffer from any major infirmity. If there are infirmities, then the Court should examine whether they are fatal or whether there is any corroborative evidence, which supports prosecution case and renders dying declaration acceptable. In the present case, there are inconsistencies in the evidence of P.W.1, Premiben, which casts serious doubts in our mind that three deceased persons, having received grievous injuries on their head, brain and other vital parts, could have been able to make such detailed declaration before her. It also becomes doubtful whether all the three deceased persons were in proper and fit mental condition at the time of making such statements. The medical evidence, on the contrary, indicates that, with such injuries sustained by deceased persons, they could not have been able to make such detailed statements. Under the circumstances, in our view, it is highly unsafe to base conviction entirely on the oral dying declaration alleged to have been made by three deceased persons before P.W.1. Premiben.

17. For the reasons stated in the judgment, the appeal of the appellants is allowed. Judgment and order dated May 20, 1992 passed by the learned Additional Sessions Judge, Jamnagar in Sessions Case No.14 of 1991 and the conviction and sentence imposed on the appellants are hereby quashed and set aside. Appellants are ordered to be set at liberty forthwith, if their presence is not required in any other case. Muddamal be disposed of in terms of the directions given by the learned Additional Sessions Judge in the impugned judgment.

October 20, 2000 (M.H. Kadri, J.)

(A.L. Dave, J.)